Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1996

Johnie Vollert,
Petitioner,

vs.

City of Houston,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES A POLICE DEPARTMENT HAVE THE AUTHORITY TO CHILL AND SUPPRESS A POLICE OFFICER'S SPEECH REGARDING MATTERS OF PUBLIC CONCERN WHEN THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS DOES NOT OUTWEIGH THE OFFICER'S RIGHT TO FREE SPEECH?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

PROCEEDINGS BELOW 1

FACTS 2

ARGUMENT 7

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS PETITIONER'S RIGHT TO FREE SPEECH 7

A. Petitioner's Speech Did Not Threaten To Disrupt The Police Department 11

1. The time, place, and manner of Petitioner's speech entitles it to a higher level of protection 13

2. Petitioner's speech did not impede his ability to perform his duties 16

3. Petitioner's speech did not impede the harmony of the police department 17

Page

II. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN NOT ADDRESSING THAT THE TRUE MOTIVE BEHIND RESPONDENT'S REPRIMAND WAS TO EFFECTIVELY CHILL AND SUPPRESS PETITIONER'S SPEECH 18

III. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO GIVE WEIGHT TO THE CONTEXT IN WHICH PETITIONER'S DISPUTE AROSE AND THE DEGREE OF PUBLIC INTEREST IN PETITIONER'S SPEECH 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) . . 12, 13, 16

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983) 8, 9, 10, 16

Coughlin v. Lee, 946 S.W.2d 1152, 1154 (5th Cir. 1991) . . 8

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996) 10, 21

DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995) 10

Eiland v. The City of Montgomery, 797 F.2d 953 (11th Cir. 1986) 18

Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert denied*, 106 S.Ct. 1789 (1986) 9

Harper v. Crockett, 868 F.Supp. 1557 (E.D. Arkansas, Little Rock Div., 1994) 19

Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983) 7-8

Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir), *cert. denied*, 468 U.S. 1204, 104 S.Ct. 3571 (1984) . . 21

Matherne v. Wilson, 851 F.2d 752, 761 (5th Cir. 1988) 9

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) 8, 9, 10, 11, 21

Table of Authorities continued

Page

Piver v. Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir.), *cert. denied*, 487 U.S. 1206, 108 S.Ct., 2847 (1988) 21

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891 (1987) . . 11

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) . . . 17, 21

Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332 (1958) . . 18

Tindle v. Caudell, 56 F.3d 966 (8th Cir. 1995) . . . 13, 14, 17

United States Department of Justice v. Federal Labor Relations Authority, 955 F.2d 998, 1005 (5th Cir. 1992) 9

Vojvodich v. Lopez, 48 F.3d 879 (5th Cir.), *cert denied*, 116 S.Ct. 169 (1995) 8, 9

Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) . 12, 15, 16, 20

Waters v. Churchill, 511 U.S. 661, 114 S.Ct. 1878 (1994) . . 21

Yoggerst v. Steward, 623 F.2d 35, 40 (5th Cir. 1980) 16

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is unpublished and is reprinted in the Appendix at 1.

JURISDICTION

This Court has jurisdiction over this petition for writ of certiorari from a decision of the Fifth Circuit Court of Appeals under the provisions of 28 U.S.C. §1254. Federal Jurisdiction is proper under the United States Constitution, 28 U.S.C. §1331. The decision of the United States Court of Appeals for the Fifth Circuit was filed January 17, 1997, and Petitioner thereby timely filed a Motion for Rehearing which was denied on February 13, 1997, and this petition for certiorari was timely filed within ninety (90) days of that date.

CONSTITUTIONAL PROVISIONS INVOLVED

THIS QUESTION INVOLVES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

PROCEEDINGS BELOW:

Petitioner appealed to the Fifth Circuit Court of Appeals after a United States District Court for the Southern District of Texas granted Respondent's Motion for Summary

Judgment as a matter of law. The Fifth Circuit Court of Appeals affirmed the District Court's decision on January 17, 1997. It is from the Fifth Circuit Court of Appeal's decision that Petitioner requests that certiorari be granted and that the decision of the Fifth Circuit Court of Appeals be reversed with the case being remanded for the completion of discovery and trial.

FACTS:

In December 1992, the City of Houston and defendants in a suit styled *Dorothy Edwards, et al., v. City of Houston,* Civil Action Number H-92-2510, Southern District of Texas, tentatively settled by consent decree, a series of lawsuits which had ground-on for some sixteen years. Succinctly put, the various plaintiffs had alleged an ongoing pattern and practice of racial discrimination in hiring and promotions at the Houston Police Department ("HPD") (R.O.A. 301, 302).

The actual consent decree was entered in February 1993, and sought to settle all such lawsuits. Pertinent to this lawsuit is the manner by which past discrimination was to be remedied. First, the City was required to remedially promote a certain number of officers. Second, in future sergeants and lieutenants promotion tests, test questions were to be analyzed for possible racial bias. Using a log linear analysis, **after the test was taken**, racially biased questions and responses were to be eliminated. This *post-facto* adjustment potentially harmed those test takers who correctly answered the eliminated questions and answers. The first sergeant's exam to which the log linear analysis was applied was the exam taken by Petitioner Vollert, who is a white male. (R.O.A. 319).

Petitioner sat for the sergeants exam on March 5, 1993. Preparation for the exam was intense. The volume of knowledge covered required serious candidates to study very hard. Immediately after the exam was taken, test results were announced. Petitioner scored in the top twenty. (R.O.A. 319).

The consent decree caused concern among the rank and file police officers. (R.O.A. 273, 296-300). Local newspapers covered the unfolding story. (R.O.A. 272, 299). Many board members, including Petitioner, felt that the consent decree's remediation methods punished individuals who deserved a promotion because of their exam results. Also many board members realized that individuals who were promoted because of their race and minimum test results jeopardized the department's morale and efficiency. Highly competent individuals were passed over in the rush to remedy HPD's past transgressions. In short, a perception existed that merit was sacrificed to expediency. (R.O.A. 399-400).

Petitioner was a longtime member of the Houston Police Officer's Association ("HPOA"), a multi-ethnic policemen's labor organization (R.O.A. 275, 305), over which Chief Nuchia had no direct control. (R.O.A. 307). In May 1993, Petitioner was an elected member of the HPOA's Board of Directors. The HPOA also had minority board members, African-American and Hispanic (R.O.A. 243).

Throughout the time period that the consent decree was being negotiated, HPOA, as well as other police organizations discussed within their board rooms and in member meetings the consent decree's ramifications.[1]

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1. Several police organizations exist within the rank and file of HPD. Beside the HPOA, there is the Houston Patrol Union (HPPU), the African-American Police Officers League (AAPOL), the White Officers

(R.O.A. 270). During the Spring of 1993, in HPOA board meetings, Petitioner was very vocal about the inherent unfairness in the consent decree. He stated his opinions about merit versus remediation. (R.O.A. 251, 317-320). The HPOA's official stance was to oppose Chief Nuchia's philosophies and decision. (R.O.A. 301, 317-320). Predictably, the Organization for Spanish Speaking Officer's ("OSSO") and HPOA took opposite sides on the *Edwards* consent decree. (R.O.A. 258-259).

On May 17, 1993, a week before his scheduled promotion ceremony, Petitioner, while out of uniform and at the HPOA offices, composed an invitation to his promotion. The invitation expressed, in a satiric format, his feelings regarding the *Edwards* consent decree's effect on the promotion process. Petitioner believed that individuals who were undeserving of promotion were receiving promotions at the expense of individuals who were competent and qualified. It was not his intention to communicate racial slurs or jokes. (R.O.A. 317-320).

Petitioner made fifteen (15) copies of the invitation, placing one copy in each of the HPOA board members' mailboxes, both the minority and non-minority board members. This was the extent to which Petitioner communicated his invitation. (R.O.A. 317-320). On or about May 20, 1993, Officer Matt Perales ("Perales"), an HPOA Hispanic board member, found the invitation in his mailbox. Perales had been present in several HPOA board meetings in which Petitioner had expressed his opinions about the consent decree. (App. 250, 249). Perales worked in the HPD Personnel Office (R.O.A. 248). Several days

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Association (WHOA), and the Spanish Speaking Officers Organization (OSSO).

later, he shared Petitioner's invitation with Officer Ignacio Aranda ("Aranda"), who was the president of OSSO. (R.O.A. 247). The methodology on how Perales transmitted the invitation is conflicting. Whatever the method of transmission, Perales bypassed the prescribed rules for filing a grievance. (R.O.A. 264-265, 308). By his own admission, Perales availed himself of Aranda's political connections with Chief of Police Sam Nuchia ("Chief Nuchia"). (R.O.A. 241). Both Perales and Aranda seemed to share the same slighted feelings regarding Petitioner's invitation. (R.O.A. 245-246, 268-269).

Nevertheless, on or about May 25, 1993, Aranda, who was employed in the HPD's Internal Affairs Division ("IAD"), composed and sent a letter to Doug Elder, president of HPOA.[2] (R.O.A. 276-277, 379). Aranda proposed to allow HPOA to remedy what Aranda viewed as Petitioner's racist commentary. (R.O.A. 267). Aranda was also a member of HPOA, but not a board member. (R.O.A. 275).

Elder replied immediately to Aranda's letter (R.O.A. 376). Elder disavowed HPOA's agreement with Petitioner's beliefs, and he noted that Petitioner did not seek approval to use HPOA's letterhead. However, the response was not to Perales' and Aranda's satisfaction, for they had more punitive measures in mind. (R.O.A. 266). On June 7, 1993, Aranda wrote a letter to Chief Nuchia, a letter which Aranda hand-delivered. (R.O.A. 373). The entire process of bringing Petitioner's letter to Nuchia's attention by-passed the usual and customary methods of grieving problems. (R.O.A. 260, 264-265). This letter initiated an IAD investigation of Petitioner. (R.O.A. 370).

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2. Internal Affairs is an HPD investigatory body which investigates complaints registered by other officers or the public.

Between May 17, 1993 and June 29, 1993, the date IAD began its investigation (R.O.A. 370), several important events occurred. In his June 1993, newsletter to OSSO members, Aranda published his monthly front page letter. (R.O.A. 260, 323). Prior to this mass publication, Petitioner's invitation had not been posted or published elsewhere. (R.O.A. 242, 302). In the letter, Aranda almost verbatim published Petitioner's letter and then provided his own incendiary language, a veritable call to the barricades. (R.O.A. 242, 302). Aranda visited with Chief Nuchia regarding the status of the letter. (R.O.A. 261). Nuchia indicated that he was taking care of the situation through IAD. (R.O.A. 261).

The IAD investigation included the taking of a statement from Perales. (R.O.A. 359). Petitioner provided a statement as well. (R.O.A. 364). Afer the investigation of the complaint, IAD concluded that it should be sustained. (R.O.A. 354). This opinion was delivered through the chain of command, first, to Captain Tompkins, Petitioner's immediate supervisor, then to Tompkins''s supervisor, Assistant Chief of Police Simmons. Assistant Chief Simmons is a 28 hear veteran of HPD. (R.O.A. 313). Simmons had great familiarity with operations and procedures within HPD. (R.O.A. 310-312). Simmons worked closely with Chief Nuchia (App. 309) and kept close tabs on police officer morale. (R.O.A. 303-304). Between May 17, 1993, and the filing of the Aranda-Perales' complaint, Simmons did not notice any dissension or turmoil brought on by Petitioner's invitation. (R.O.A. 298, 302). Nor did he receive any complaints after the OSSO newsletter was published. (R.O.A. 294-295). Both Tompkins and Simmons believed that the least punitive punishment should be meted out, that is, a verbal counseling. (R.O.A. 281-284, 292-293). This they recommended to Chief Nuchia through Chief Assistant Breshears, Assistant Chief Management

Services Command. (R.O.A. 354). However, Chief Nuchia chose not to follow their recommendations, but rather chose a more punitive measure, the placement of a written reprimand in Petitioner's personnel file. (R.O.A. 351). Chief Nuchia, a licensed attorney, made the recommendation after consultation with HPD legal counsel and Simmons. (R.O.A. 286-290, 347).

The written reprimand branded Petitioner as a racist. (R.O.A. 284-285). Furthermore, this label potentially harmed Petitioner's future promotion possibilities. (R.O.A. 396).

Believing that his First Amendment rights were violated by Chief Nuchia, Petitioner filed a grievance against Chief Nuchia. This grievance was denied. (R.O.A. 347). Petitioner, then filed through the Civil Service Commission an appeal through arbitration. (R.O.A. 340). The arbitrator ruled against Petitioner.

ARGUMENT

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS PETITIONER'S RIGHT TO FREE SPEECH.

Government employees do not relinquish their First Amendment right to free speech when they enter public service; however, those rights, unlike the citizenry-at-large, are subject to the state's interest in promoting the efficiency of the pubic services it performs. *Hughes v. Whitmer*, 714

F.2d 1407 (8th Cir. 1983). In *Pickering v. Board of Education*, this Court set out a two-fold test to determine whether a government employer may place limits upon its employee's right to free speech pursuant to the First Amendment of the United States Constitution. 391 U.S. 563, 568, 88, S.Ct. 1731 (1981); *Vojvodich v. Lopez*, 48 F.3d 879, 884-885 (5th Cir.), *cert denied*, 116 S.Ct. 169 (1995). As a threshold matter, the employer must establish that his speech related to matters of public concern. *Vojvodich*, 391 U.S. at 884. This determination is a question of law to be resolved by the court. *Coughlin v. Lee*, 946 S.W.2d 1152, 1154 (5th Cir. 1991). Once the employer establishes that the speech at issue involves a matter of pubic concern, the burden shifts to the employer to establish that its interest in promoting the efficient management of its operations outweighs the employee's First Amendment rights. *Id.* at 885.

Consequently, governmental employers may legitimately curtail the free speech rights of their employees to promote efficiency, loyalty and departmental morale, **provided only that these interests outweigh the employees' right to free speech.** *Id.* [emphasis added]. In other words, in determining whether Chief Nuchia's reprimand infringed upon Petitioner's speech, a balance must be struck against HPD's interest in promoting efficiency, discipline and morale. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). To strike this balance, the court must consider the nature of the employment relationship and the nature of the speech activity involved. *Pickering*, 391 U.S. at 569-73. Due to the varying circumstances of each employee's situation, the court must look to each employee's particular facts making a decision on a case-by-case basis. *Vojvodich*, 48 F.3d at 885.

After the District Court correctly determined that

Petitioner's speech was a matter of public concern[3], the Fifth Circuit erred in affirming the District Court's conclusion that Petitioner's speech threatened to disrupt the HPD. In *Connick v. Myers*, this Court set out six factors to be weighed in evaluating the particular facts of each case:

> (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close relationship between the employees which might be deteriorated by the speech; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech, and; (6) whether the speech impeded the employee's ability to perform his or her duties. 103 S.Ct. at 1692-93; *United States Department of Justice v. Federal Labor Relations Authority*, 955 F.2d 998, 1005 (5th Cir. 1992).

This balancing test "is not all-or-nothing but rather a sliding scale under which 'public concern' is weighed against disruption." *Vojvodich*, 48 F.3d at 884; *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988) (quoting *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985), *cert denied*, 106 S.Ct. 1789 (1986). In applying the *Pickering* balancing test, two important considerations which have been noted by the courts must be kept in mind. First, the courts have repeatedly recognized that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Connick*, 461 U.S. at 145. Second, the courts have repeatedly recognized that "a stronger showing of disruption may be necessary if the employee's speech more substantially

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3. The district court concluded that since the *Edwards* consent decree was a matter of public concern and Petitioner's invitation was a comment on the *Edwards* consent decree, Petitioner's invitation was a matter of public concern.

involves matters of public concern." *Id.* Both of these considerations are relevant to Petitioner's case. The Fourth Circuit recently stated that:

> "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply and not yet well-defined." *Cromer v. Brown,* 88 F.3d 1315, 1325 (4th Cir. 1996) (quoting *DiMeglio v. Haines,* 45 F.3d 790, 806 (4th Cir. 1995). "But we did not say that a public employee's right to speak out on matters of public concern could never be clearly established." *Id.*

With this in consideration, Petitioner concedes that the *Pickering* balancing test may not be an easy burden to meet, but Petitioner feels strongly that when all the *Connick* factors are properly weighed and all the evidence on the record is properly considered, Petitioner's case is one of those "infrequent" cases where an employee's right to speak on a matter of public concern clearly outweighs its employer's interest in the efficient management of its operations.

By failing to apply all of the *Connick* factors to Petitioner's particular case and by failing to consider all of the evidence on the record, the Fifth Circuit erred in its finding that HPD's interest in promoting the efficiency of its services outweighs Petitioner's interest in disseminating the contents of the invitation. In support of its decision, the Fifth Circuit relied solely on an affidavit of Chief Nuchia. After considering only Chief Nuchia's affidavit, the Fifth Circuit summarily concluded that "Vollert's speech was so offensive,

in the context of his work environment, that it caused, and would continue to cause, a disruption to the work environment." The Fifth Circuit also erred in stating "that Vollert offered no summary judgment evidence showing that his letter did not, or would not, create a disruption." By considering the "invitation" and Chief Nuchia's affidavit in a vacuum, the Fifth Circuit erred by not weighing all of the *Connick* factors in applying the *Pickering* balancing test and by failing to give credence to all of the evidence on the record.

A. Petitioner's Speech Did Not Threaten To Disrupt The Police Department.

The evidence on the record clearly shows that there was no disruption within the HPD's rank and file. More importantly, no creditable evidence exists showing a potential impediment to the HPD's ability to perform its duties efficiently. In considering whether Petitioner's speech impeded the Department's ability to efficiently perform its duties, the Court must "examine whether the speech impairs discipline by supervisors or harmony among co-workers or had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891 (1987). On appeal, Respondents provided scant evidence that Petitioner's speech had a possibility of providing even potential disruption.

Evidence that two officers (out of a total of 4,800 officers), Matt Perales and Ignacio Aranda, were allegedly "offended" and "disgusted" by Petitioner's invitation which was sent to a limited number of recipients, namely the twelve HPOA board members, is hardly evidence that discipline by supervisors or harmony among co-workers was in a potential state of impairment. (R.O.A. 379). The fact that an

individual chooses to express his ideas in language some might find offensive is not, in and of itself, enough to override his interest in speaking freely. *Waters v. Chaffin*, 684 F.2d 833 (11th Cir.1982).

Even after Aranda widely publicized Petitioner's invitation in the OSSO newsletter, there was no visible disruption nor did it generate any controversy among the rank and file officers. (R.O.A. 323). Furthermore, Assistant Chief Simmons never detected any disruption causing the Department's efficiency to be hampered, and, in his deposition, Assistant Chief Simmons repeatedly stated that after Petitioner's invitation was published in the OSSO newsletter, he never heard any complaints about the invitation or about Petitioner. (R.O.A. 302-304). Even if any efficiencies had been hampered, it was not because of Petitioner's dissemination of the invitation to a limited number of individuals, but rather a result of Aranda's publication of Petitioner's invitation in the OSSO newsletter.

Contrary to Respondent's proposition that Petitioner's invitation caused concern of potential disruption, the record does not reveal any disruption or potential disruption. No working relationships were adversely effected, Petitioner continued to supervise, and except for Perales and Aranda, there is no evidence of any other officer, either subordinate or superior to Petitioner, that found the invitation "offending" and/or "demeaning." In fact, Assistant Chief Simmons, who reports directly to Chief Nuchia, and Sergeant Craig Ferrell, HPD's legal counsel, believed that Petitioner's conduct was constitutionally protected, and as a result, both of them recommended that the allegations made by Perales and Aranda be "classified as unfounded." (R.O.A. 354).

In *Berger v. Battaglia*, the Fourth Circuit held "[i]t is at least arguable from *Pickering*, its antecedents, and its progeny, that the only public employer interest which will

outweigh a public employee's recognized speech rights is the interest in avoiding **direct disruption, by the speech itself**, of the public employer's internal operations and employment operations." 779 F.2d 992, 1000 (4th Cir. 1985) (emphasis added). In *Berger*, a white police officer, while off-duty, out-of-uniform, and off police premises, dressed up and performed in public as the black entertainer, Al Jolson. The black community took offense when it became known that Berger was a police officer. Because demonstrations and picketing were threatened, the Baltimore Police Commissioner ordered Berger to cease all public performances. Unlike Berger, Petitioner did not "take his show on the road;" Petitioner's audience, an employee union's governing board, was limited and itself greatly involved in the public debate surrounding the Edwards suit.

Finally, Respondent alleges that Chief Nuchia's sole purpose for reprimanding Petitioner was to prevent further disruption. However, if prevention of further disruption was the real reason for disciplining Petitioner, then the delay in administering the discipline, a four month time period between June 29, 1993 and October 8, 1993, did not further Respondent's purposes.

1. **The time, place, and manner of Petitioner's speech entitles it to a higher level of protection.**

Several errors were committed when the District Court held that the time, place, and manner of Petitioner's speech did not entitle it to a higher level of constitutional protection.

First, the District Court erred when it primarily relied upon *Tindle v. Caudell* in holding that the time, place, and manner of Petitioner's speech did not entitle it to a higher

level of protection. 56 F.3d 966 (8th Cir). *Tindle* is inapposite to Petitioner's particular facts. Tindle attended a Halloween party dressed in black face, wearing bib overalls and a black, curly wig, and carrying a watermelon. The issue was whether the costume itself fell under the First Amendment's protection because it came within the ambit of being entertainment. In holding that "Tindle has not shown that his costume related 'to any matter of political, social, or other concern to the community,'" the Eight Circuit concluded that Tindle did not wear the costume to incite debate, to alienate others, **to comment upon an issue**, or even to send a message. *Id.* at 968-970. (emphasis added). In contrast to Tindle, it is clear from the record that Petitioner's invitation was a "comment on an issue" regarding a matter of public concern. Petitioner had on numerous occasions, before sending the invitation to the HPOA board members, expressed his dissatisfaction with the Edwards consent decree. (R.O.A. 318-319).

Also inapposite to Petitioner's facts, Tindle, in wearing the custom, did cause more than a few adverse consequences at work. The Eighth Circuit particularly noted that the Chief of Police was concerned about possible racial friction or disharmony within the department, and was aware of **existing racial divisions** among the officers. *Id.* at 966 (emphasis added). The Eight Circuit found that the evidence in the record indicated that **potential disruption was real**, including Tindle's own testimony agreeing that his conduct had caused "quite a bit of controversy at the Police Department." *Id.* at 972. (emphasis added).

In Petitioner's case, Petitioner placed a personal and private invitation in the mailboxes of twelve board members of the HPOA, a police officers union completely detached from the Police Department, while on union property, off-duty and out of uniform. (R.O.A. 318). He did not intend to

widely publicize the invitation, and but for Aranda's publication of the invitation in the OSSO newsletter, only a limited number of individuals would have ever seen the invitation. Of those twelve members, only one board member, Perales, was offended. Perales, instead of utilizing the proper channels for his grievance, went directly to the President of OSSO, Ignacio Aranda. Because Petitioner's case is inapposite to Tindle, in that Petitioner's spoke out on an issue regarding a matter of public concern which did not cause any disruption or potential disruption in the department, Petitioner' speech is entitled to a higher level of constitutional protection.

The District Court further erred in concluding that the invitation's wide distribution made it likely that the invitation would reach additional officers and the general public. Petitioner sent the invitation to only twelve HPOA board members, one of whom was Perales. It was Perales who initiated the widespread dissemination of the invitation by enlisting Aranda's aid. Aranda, in turn, completed the widespread publication by printing the invitation in the OSSO newsletter. (R.O.A. 323). Even after Aranda's publication of the letter, there was no visible disruption or possible disruption. (R.O.A. 294-295). Therefore, even if there had been inefficiencies which hampered the operations of the department, the inefficiencies were not caused by Petitioner's dissemination of the invitation to a limited number of individuals, but rather a direct result of Aranda's publication of Petitioner's invitation in the OSSO newsletter.

Finally, the District Court erred in summarily disregarding Petitioner's reference to *Waters v. Chaffin*, 648 F.2d 833 (11th Cir.). In *Waters v. Chaffin*, the Eleventh Circuit, in reversing the District Court, held that the officer could not be disciplined for calling his Police of Chief vulgar names when the officer was off-duty, out of uniform, not on

the department grounds, and spoke to a person he considered a friend. *Id.* The Eleventh Circuit held, "[b]ecause we do not think that the department has made a showing of actual harm or a reasonable likelihood of harm to its efficiency, discipline, or harmony, we believe that the First Amendment protects this example of 'the American tradition of making passing allusion of the vicissitudes of the boss.'" *Id.* at 840; See also *Yoggerst v. Steward,* 623 F.2d 35, 40 (5th Cir. 1980). Similar to *Waters,* the record in Petitioner's case indicates that the time, place, and manner of Petitioner's speech were factors that contributed to the invitation's lack of or almost total absence of disruption or potential disruption. Therefore, like in *Waters,* Petitioner's speech is entitled to a higher level of constitutional protection.

2. **Petitioner's speech did not impede his ability to perform his duties.**

The District Court erred in summarily concluding that Petitioner's speech impeded his ability to perform his duties. The essence of the District Court's brief argument that "the use of racial jokes could cause fellow officers to lose respect for the sergeant, necessary for efficient and effective operation of the police department." (Appendix at 4). In *Berger v. Battaglia,* the Fourth Circuit stated, "In the balancing process, the only significance the particular content of the speech has is in the degree to which it tends to jeopardize the public employer's capability to perform its duties effectively and efficiently." 779 F.2d 992, 1000 (4th Cir. 1985); See also, *Connick,* 103 S.Ct. at 1693. In Petitioner's case, the District Court did not find that Petitioner's speech impeded his ability to perform his duties. Petitioner was permitted to and still retains a supervisory position with HPD. The record indicates that Petitioner continued to supervise, and except for Perales and Aranda, there is no evidence of any other officer, either subordinate

or superior to Petitioner, who found the invitation "offending" and/or "demeaning." (R.O.A. 354).

In *Rode v. Dellarciprete*, a case extremely similar to Petitioner's case, the Third Circuit held that the First Amendment protected a white officer's right to complain about alleged racial discrimination in the department's reorganization. , 845 F.2d 1195 (3d Cir. 1988). In balancing Rode's interests against the right of her employer to promote the efficiency of the public services it rendered through its employees, the court paid particular attention to any disruption in the department and Rode's ability to continue to perform her duties where close working relationships were involved. *Id.* at 1201-1202. Neither factor heavily outweighed Rode's First Amendment right to free speech.

3. **Petitioner's speech did not impede the harmony of the police department.**

The District Court subtly shifted its focus from the "defecation of controversy and disruption" to "the need for harmony in the work place" allowing it to again utilize the Eight Circuit case, *Tindle v. Caudell,* which Petitioner has already proven inapposite to the particular facts of his case. In relying on *Tindle,* the District Court erred in suggesting that Petitioner's speech caused disharmony in the department. In fact, there is no indication in the record showing disharmony or threatened disharmony in the department.

More importantly, however, the District Court erred in not recognizing that Respondent utilized "threatened disharmony" to suppress and chill Petitioner's right to speak out against the *Edwards* consent decree and its after effects. The record clearly suggests that Perales, Aranda, and

Respondent's true desire was to stifle Petitioner's outspoken views regarding the *Edwards* consent decree. Respondent hides its true motive for stifling Petitioner's speech under the notion of concern for the harmony and efficiency of the department.

II. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN NOT ADDRESSING THAT THE TRUE MOTIVE BEHIND RESPONDENT'S REPRIMAND WAS TO EFFECTIVELY CHILL AND SUPPRESS PETITIONER'S SPEECH.

Both at the trial level and on appeal, Petitioner raised a serious question regarding what Respondent's true motivation was in reprimanding Petitioner. Petitioner, who was a board member of the HPOA, was effectively and totally precluded from commenting on the *Edwards* lawsuit unless his comments were either favorable or so nebulous as to be meaningless. Both the District Court and the Fifth Circuit seriously erred in not addressing the issue which has already been found to be untenable in a free society. *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332 (1958). The First Amendment precludes government from interfering with a pubic employee's free speech rights such that government indirectly achieves a result which it could not have achieved directly. *Id.*

In *Eiland v. The City of Montgomery,* the Eleventh Circuit in overturning the trial court, stated:

> "This concern is associated with the paramilitary nature of a police department and the need to preserve departmental respect and discipline. But the need for discipline as an abstract concern should not be allowed to overshadow individual interest in free speech unless the department's true interest in

> suppressing the speech in this regard can be isolated and verified."

797 F.2d 953, 959 (11th Cir. 1986).

The Eleventh Circuit was unmoved by argument that disruption, real and potential, justified the demotion of a corporal to the rank of police officer for registering his dislike of an incumbent mayor's politics by way of a satiric poem. The Eleventh Circuit noted that Eiland's speech dealt with a political campaign, thus a very high showing of potential disruption was necessary. Similar to the intended effect in Eiland's demotion, Respondent's true interest in suppressing Petitioner's speech was to effect indirectly what it could not command directly. Clearly Chief Nuchia could not have commanded Petitioner to cease registering his verbal dissatisfaction with the *Edwards* consent decree within the HPOA's headquarters.

After the allegedly offensive incident, Respondent accomplished placing Petitioner under the threat of sanction for some five months. Five months later, Respondent finally delivered on that threat. It is important to note that two months elapsed between Petitioner's delivery of the invitation and the official initiation of the investigation. Three more months passed before Petitioner received his reprimand. Petitioner's actual reprimand occurred long after any disciplinary action designed to deal with an immediate disruption would have been effective. These time lapses raise significant doubt as to Respondent's true rationales for punishing Petitioner.

In instances were disruption is immediate, reaction by government should necessarily be immediate. See *Harper v. Crockett,* 868 F.Supp. 1557 (E.D. Arkansas--Little Rock Div. 1994). "[A] long delay between the incident and the notice

of discharge belies the argument that the comments actually had an adverse effect on the department." *Waters*, 684 F.2d at 839. "The reasonable possibility of adverse harm will generally be enough to invoke the full force of judicial solicitude for a police department's internal morale and discipline." *Id.* The absence of facts showing a reasonable possibility of adverse harm to the department serves to confirm that the motive behind Respondent's reprimand was really to chill and stifle Petitioner's criticism of the *Edwards* consent decree.

The Fifth Circuit's affirmation of the District Court's decision delivers a disturbing message to police officers and government employees. Any police chief may effectively suppress speech articulated in a union hall if the right magic words or phrases are articulated to support a disciplinary action. If politically adverse or uncomfortable criticism is directed toward HPD's policies or decisions, then Respondent need only chant "potential disruption" to justify any disciplinary action necessitated to suppress the speech. An even more disturbing message is conveyed in the holding that fellow employees who also know the magic words and phrases can ruin careers and inconvenience their peers by enlisting the government's assistance in suppressing, chilling, and punishing those who exercise their legitimate rights under the First Amendment.

III. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO GIVE WEIGHT TO THE CONTEXT IN WHICH PETITIONER'S DISPUTE AROSE AND THE DEGREE OF PUBLIC INTEREST IN PETITIONER'S SPEECH

Because Petitioner's speech involved a matter of public concern, we must now balance Petitioner's interest in

disseminating the invitation against Respondent's interest in maintaining an efficient workplace. *Pickering*, 391 U.S. at 568. In the initial analysis of the efficient operations of the department, it is important to note that interests of the community also weigh in the balance. *Piver v. Pender County Bd. of Educ.*, 487 U.S. 1206, 108 S.Ct. 2847 (1988).

In *Cromer v. Brown*, the Fourth Circuit held the interests to be balanced under *Pickering* weighed so heavily in Cromer's favor that his right to speak about perceived racial discrimination was clearly established. 88 F.3d at 1326. See also, *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988). In *Cromer*, the effectiveness of a major law enforcement agency was being called into question. The public has a fundamental interest in effective law enforcement organizations that are free of discrimination. *Id.* Thus, the Fourth Circuit held that Cromer's individual interests merged with those of the community at large and those merged interests are substantial.
"For a police force to be effective it must have the respect and support of the community as well as its officers; our system of government demands that support be garnered through informed evaluation of circumstance, and not through the suppression of dissent." *Leonard v. City of Columbus*, 705 F.2d 1299, 1305 (11th Cir. 1983). Accordingly, the public has a keen interest in assuring that its police officers are free to speak up about any broad-based discrimination in their agencies. *Cromer*, 88 F.3d at 1326. After all, "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 1887 (1994).

Cromer is exactly similar to Petitioner's case.

Petitioner's speech concerned HPD's recent practices and policies concerning racial discrimination in its own department. When Petitioner's interest are merged with the interest of the community at large in ensuring an effective police force, the scale tilts heavily in Petitioner's favor. Petitioner's speech regarding internal perceptions of racial discrimination in a law enforcement agency must be given great weight considering the community at large also shares heavily in that interest.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with the overwhelming weight of the evidence and similar cases decided by the Third, Fourth, Fifth, Eighth and Eleventh Circuits. The conflicts are irreconcilable.

For the foregoing reasons, Petitioner respectfully requests this Court grant his Petition for a Writ of Certiorari, vacate the Fifth Circuit Court of Appeals's judgment, and remand for further consideration.

Respectfully submitted,

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APPENDIX

APPENDIX

Page

Vollert's Invitation ..... App. 1

Opinion of the United States District Court for the Southern District of Texas, Case No. H-95-674, March 5, 1996 granting the City's motion for summary judgment ..... App. 2

Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 96-20341, January 17, 1997 affirming the District Court's Opinion ..... App. 26

Order of the U.S. Court of Appeals for the Fifth Circuit denying rehearing, February 13, 1997 ..... App. 39

May 17, 1993

I will be getting promoted (despite my race) on May 24, 1993 at 1:30 pm at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast corner of Memorial and S. Shepherd. You are cordially invited to attend and give proper and justice respects to chose who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

Johnie Vollert

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SERGEANT JOHNIE A. VOLLERT,	§	
Plaintiff,	§	
vs.	§	ACTION NO. H-95-674
CITY OF HOUSTON, TEXAS	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before this court is a motion for summary judgment filed by defendant, the City of Houston ("the City") (Docket Entry No. 13). Plaintiff Johnie A. Vollert ("Vollert") alleges that the Houston Police Department ("HPD") violated his First Amendment right to free speech by issuing Vollert a written reprimand in retaliation for his speaking out on a matter

of public concern. Based on the pleadings, motions, submissions, and applicable law, this court GRANTS the City's motion, for the reasons stated below.

I. Background

The relevant facts are undisputed. In December 1992, the city entered into a consent decree that settled a lawsuit styled *Edwards v. City of Houston*, Civil Action No. H-92-2510, in the Southern District of Texas. The plaintiffs in that lawsuit alleged that HPD discriminated against minorities in hiring and promotions. The consent decree required the City to promote certain officers and to determine whether questions on promotion tests were racially biased by analyzing the test results. Questions determined to be racially biased were to be eliminated from the test results and the applicants' scores were to be adjusted accordingly.

On March 5, 1993, Vollert took the promotion

examination for the rank of sergeant. In May 1993, Vollert was elected a board member of the Houston Police Officers Association (HPOA). During the spring of 1993, Vollert was a vocal opponent of the consent decree in HPOA board meetings.

In May 1993, HPD promoted Vollert to sergeant. On May 17, 1993, Vollert placed a written invitation in the HPOA mailboxes of the fourteen other HPOA board members. The invitation stated as follows:

> I will be getting promoted (despite my race) on May 24, 1993 at 1:30 pm at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast comer of Memorial and S. Shepherd. You are cordially invited to attend and give proper and justice [sic] respects to those who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.
>
> (Docket Entry No. 15, Ex. 1).

On October 9, 1993, HPD issued Vollert a written reprimand for distributing the invitation. The written

reprimand stated, in relevant part as follows:

> Investigation revealed that on the above date, while off duty, you prepared a letter to announce your upcoming promotion to sergeant on May 24, 1993. Although the correspondence was distributed to a limited number of co-workers, you used poor judgment by including remarks and/or terms in the letter which were demeaning to fellow officers, embarrassing to the Department, and of a nature that could be considered a racial slur or to be racially motivated.
>
> It has been determined that, by your actions, you have violated the following:
> HOUSTON POLICE DEPARTMENT RULES MANUAL
> Section(s) 2.3 - Conduct and Behavior
> 3.1 - Respect for Fellow Officers
> 4.2i - Use of Racial Jokes and Slurs

(Docket Entry No. 15, Ex. 10).

Vollert appealed the reprimand to a third party hearing examiner pursuant to Tex. Loc. Govt. CODE ANN. § i43.1016 (Vernon Supp. 1996).

On September 29, 1994, the examiner upheld the reprimand but ordered that the reprimand be removed from Vollert's file three years after the date of its issuance if Vollert received no

additional disciplinary actions during that time period. (Docket Entry No. 13, Ex. 12, Attachment 2).

Vollert filed this lawsuit on March 6, 1995, alleging that the City violated 42 U.S.C. § 1983 by infringing on Vollert's First Amendment rights. The City seeks summary judgment that, as a matter of law, its actions did not violate the Constitution.

II. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56. Under FED. R. Civ. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Nonnan v. Apache Corp.*, 19 F.3d 1017, 1023 (5th

Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. Little, 37 F.3d at 1075.

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). The nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S. Ct. at 2553-54).

In deciding a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all

justifiable inferences are to be drawn in his *favor." Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2513. "Rule 56 *mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S.Ct. at 2552).

III. The City's Motion for Summary Judgment

The Fifth Circuit has explained the test for determining the limits

that a government employer may place on its employees' speech rights

as follows:

> [T]he scope of a public employee's First Amendment rights must be determined by balancing the "interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *[Pickering v. Board of Education*, 391 U.S. 563, 569, 88 S. Ct. 1731) 1734 (1968)1; *Connick v. Myers*, 46i U.S. 138,

142) 103 S. Ct. 1684) 1687, 75 L. Ed.2d 708 (1993). First, the employee must establish that his speech involves a matter of public concern. *Coughlin v. Lee*, 946 F.2d 1152, 1154 (5th Cir. 1991). Whether speech addresses a matter of public concern is to be "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-49, 103 S. Ct. at 1690. This determination is a question of law to be resolved by the court. *Coughlin*, 946 F.2d at 1152. If the speech at issue involves a matter of public concern, and is thus protected by the First Amendment, the employer then must show that its interest in promoting the efficiency of the services provided by its employees outweighs the employee's interest in engaging in the protected speech. *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691; *Rankin v. McPherson*, 483 U.S. 378, 388-89, 107 S. Ct. 2991, 2899, 97 L. Ed.2d 315 (1987). "[The State's burden in justifying a particular [action or policy] varies depending upon the nature of the employee's expression." Connick, 461 U.S. at 150, 103 S. Ct. at 1692. "The more central a matter of public concern the speech [or association] at issue, the stronger the employer's showing of counter-balancing governmental interest must be." *Coughlin*, 946 F.2d at 1157. The determination of the appropriate balance is also a legal determination to be made by the court. *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691.

United States Department of Justice v. Federal Labor Relations Authority, 955 F.2d 999, 1005 (5th Cir. 1992).

"Only if the court finds that the employee's First Amendment rights outweigh the government's interest in the effective provision of public services does the fact-finder proceed to consider the separate issue of causation." *Coughlin v. Lee*, 946 F.2d at 1152.

The City argues that the written reprimand did not violate Vollert's First Amendment rights because the invitation Vollert sent did not involve a matter of public concern, or, in the alternative, because HPD's interest in promoting the efficiency of its services outweighed Vollert's interest in sending the invitation.

A. Speech on a Matter of Public Concern

"Issues rise to the level of public concern if an individual speaks primarily in his role as a citizen rather than as an employee, or if the information conveyed is of relevance to the public's

evaluation of the performance of governmental agencies. *Coughlin*, 946 F.2d at 1157. - "However, if the employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Thompson v. City of Sackville, Miss.*, 901 F.2d 456, 461 (5th Cir. 1990).

In a memorandum to Chief of Police Sam Nuchia, Vollert described the invitation as follows:

> The letter was a tongue-in-cheek invitation meant only for members of our board. At no time did I intend this letter to be public or go beyond the above stated scope nor did I facilitate it [sic] distribution in any manner.

(Docket Entry No. 13, Simmons Affidavit, Ex. 4). Vollert also claims that the invitation showed his disagreement with the *Edwards* consent decree.

The hearing examiner noted that one of Vollert's witnesses described the invitation as satirical, without

socially redeeming value, and not a serious contribution to public discussion of the *Edwards* lawsuit. (Docket Entry No. 13, Attachment 2). At the time Vollert sent the invitation, the *Edwards* lawsuit had already been settled.

In Rankin v. McPherson, 107 S. Ct. 2891 (1987), an employee claimed she was discharged in violation of her First Amendment rights for. stating, after an attempt on the president's life, "if they go for him again, I hope they get him." The statement was made in the course of a conversation about the policies of the president's administration. The Supreme Court concluded that, in the context described, the statement was a matter of public concern, noting that the inappropriate or controversial character of a statement is Irrelevant to the question whether it deals with a matter of public concern." *Id.* at 2898.

Police officers had widely discussed the *Edwards* consent decree, and Vollert had previously discussed the

decree with the HPOA board members. Given this context, Vollert's invitation was, in part, a comment on the *Edwards* consent decree. Police Chief Nuchia appears to agree that through the invitation, Vollert intended to comment upon the *Edwards* consent decree. (Docket Entry No. 13, Attachment 3, 1 4). The *Edwards* consent decree was a matter of public concern; Vollert's invitation commented on a matter of public concern.

B. Balancing BPD's and Vollert's Interests

Because Vollert's invitation was speech on a matter of public

concern, the court must decide whether HPD's interest in the efficient management of its operations outweighs Vollert's interest in the speech. *United States Department of Justice,* 955 F.2d at 1005.

The Picketing balance requires a court to decide each claim on a case-by-case basis, giving full consideration to the government's interest in efficient public service. *Connick v.*

Myers, 103 S. Ct. 1684, 1691-92 (1983). The factors to be weighed include: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties. Id. at 1692-93; *United States Department of Justice*, 955 F.2d at 1006.

A court must accord to the government the wide degree of discretion necessary for the proper management of internal affairs and personnel decisions. *Connick*, 103 S. Ct. at 1692 *(citing* Amer. v. *Kennedy*, 94 S. Ct. 1633, 1651 (1974)). The degree of discretion varies with the nature of the employee's duties and the legitimate needs of the government.

Pickering, 88 S. Ct. at 1735.

The Fifth Circuit requires an examination of whether the speech: (1) was likely to generate controversy and disruption; (2) impeded the public agency s general performance and operations; and (3) affected working relationships necessary to the agency's proper functioning. *Davis v. Ector County, Tex.*, 40 F.3d 777, 783 (5th Cir. 1995). The balancing test "is not all-or-nothing but rather a sliding scale under which 'public concern' is weighed against disruption: '[a] stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern.'" *Matheme v. Wilson, 851* F.2d 752, 761 (5th Cir. 1988) (quoting *Gonzalez v. Benavides,* 774 F.2d 1295 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 1789 (1986)).

1. The Need for Harmony in the Work Place

"The need for harmony and close working relationships

between coworkers in a police department is of great importance." *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995); *see also Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1994). A police department's interest in developing discipline, *esprit de corps*, and uniformity within its ranks, so as to insure the safety of persons and property, is substantial and greater than the interest of the typical government employer. *Hughes*, 714 F.2d at 1419.

Vollert claims that a disputed question of fact exists as to whether his invitation disrupted HPD operations or generated controversy. A showing of actual disruption, however, is not required. *Tindle*, 56 F.3d at 972; *Shands v. City of Kennett*, 993 F.2d 1337, 1344-45 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 880 (1994). The police department "need not allow events to unfold to the extend that the disruption of the office and the destruction of working

relationships is manifest before taking action." *Tindle*, 56 F.3d at 972. Instead, the court should "look to the facts as the employer *reasonably* found them to be." *Waters*, 114 S. Ct. at 1889. Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than many government employers. *Tindle*, 56 F.3d 966, 971 (8th Cir. 1995); *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1409 (8th Cir. - 1990). A police department's determination that an officer's speech is disruptive is entitled to considerable deference. *Hughes*, 714 F.2d at 1419. A police department's discretionary decision to discipline an officer whose speech has contributed to disruption is similarly entitled to considerable deference. *Id.*

Officer Matt Perales ("Perales") was one of the HPOA board members who received Vollert's invitation. Perales's

"immediate response to this appalling letter was of disgust." (Docket Entry No. 8). Perales showed the invitation to Officer Ignacio Aranda, president of the Organization of Spanish Speaking Officers ("OSSO").

By letter dated May 26, 1993, Aranda complained about the invitation to Doug Elder, president of HPOA, describing the invitation as "racially biased," "demeaning," "in poor taste," and "offensive not only to OSSO but to all minorities of the Houston Police Department." (Docket Entry No. 15, Ex. 2). By letter dated June 7, 1993, Aranda complained about the invitation to Chief Nuchia. The OSSO June 1993 newsletter featured an article written by Aranda which described Vollert's invitation as demeaning, in poor taste, and offensive. (Docket Entry No. 19). The article called for Vollert's resignation as a board member of HPOA and encouraged officers to speak out against "[t]his type of attitude and racial bias."

HPD disciplined Vollert based on the belief that racial jokes and slurs are demeaning and embarrassing to fellow officers and likely to deteriorate department efficiency. (Docket Entry No. 13, Nuchia Affidavit, Attachment 3). The contents of the invitation elicited a strong and well-publicized response from minority officers. HPD found that Vollert's invitation was demeaning to fellow officers, embarrassing to the department, and of a nature that could be considered a racial slur or to be racially motivated. HPD concluded that Vollert's invitation violated department regulations governing the conduct and behavior of an officer, respect for fellow officers, and the use

of racial jokes and slurs. HPD and the hearing examiner agreed that Vollert's invitation had the potential to disrupt the efficiency of HPD. (Docket Entry No. 13, Attachment. 2, page 30 and Attachment 3, Nuchia Affidavit). As a sergeant

in HPD, Vollert works closely with minority officers. Chief Nuchia issued the reprimand to Vollert to prevent further disruption in the department. *Id.*

The undisputed facts show that HPD's concern that Vollert's invitation would disrupt the efficient operation of the police department had a. reasonable basis. *Tindle*, 56 F.3d at 972. HPD's interest in efficiently managing its operations outweighs Vollert's interest in the speech at issue.

2. The Time, Manner, and Place of the Speech

Vollert argues that his speech is entitled to a heightened level of protection because he wrote the invitation while off-duty, out of uniform, and not on police property. Vollert relies on *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982), in which a police officer challenged a demotion for having called the police chief vulgar names. The Eleventh Circuit held that the officer could not be disciplined because he was off-duty, out of uniform, in a bar away from the department's

jurisdiction, and having a private conversation with one person he considered a

friend. 684 F.2d at 837.

In Tindle, a white police officer was suspended for attending a Halloween party at a police union lodge dressed in black face, wearing bib overalls and a black curly wig, and carrying a watermelon. 56 F.3d at 968. The Eighth Circuit upheld the suspension even though the officer was off-duty and in a private setting, noting that other officers and guests witnessed his appearance.

In this case, Vollert sent his invitation to fourteen other officers. The invitation's wide distribution made it likely that the invitation would reach additional officers and the general public. *Shands*, 993 F.2d at 1346. The invitation was to an official function, a promotion ceremony. The time, place, and manner of the speech do not entitle it to a higher level of protection.

3 Whether the Speech Impeded Vollert's Ability to Perform His Duties

It is undisputed that as a police sergeant, Vollert works closely with minority officers. In disciplining Vollert, HPD relied on its experience that a sergeant's use of racial jokes causes fellow officers to lose respect for the sergeant, necessary for efficient and effective operation of the police department. Although the record is unclear as to whether Vollert's speech actually impeded his ability to perform his duties, an employer need not demonstrate that the employee's speech did impede him from performing his job responsibilities. *Connick*, 103 S.Ct. at 1692; *Shands*, 993 F.2d at 1346.

Considering the *Connick* factors together, this court concludes that HPD's interest in promoting the efficiency of its services outweighs Vollert's interest in disseminating the contents of the invitation.

IV. The Preclusive Effect of the Hearing

Examiner's Decision

The City contends that the hearing examiner's decision precludes Vollert from asserting non-constitutional issues in federal district court. (Docket Entry No. 13, page 10-11). The City contends that although Vollert is not precluded from raising constitutional claim, the court should give the hearing examiner's decision rejecting those claims great weight. Vollert argues that the arbitrator's decision is not binding because it was based on constitutional issues, relying on *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1136 & n.3

(5th Cir. 1991).

Vollert appealed the written reprimand to the hearing examiner pursuant to TEX. LOC. GOVT. CODE ANN. § 143.1016 (Vernon Supp. 1996), which provides, in relevant part, as follows:

(a) . . . the appealing fire fighter or police officer may elect to appeal to an independent third party hearing examiner instead of to the commission. . . .
(c) The hearing examiner's decision is final and binding on all parties. If the fire fighter or police-officer decides to appeal to an independent third party hearing examiner, the person automatically waives all rights to appeal to a district court except as provide by Subsection (j).
(j) A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration or that the order was procured by fraud, collusion, or other unlawful means.

This court finds it unnecessary to decide whether the hearing examiner's decision precludes Vollert from banging some or all of his claims in this court. Reviewing all of Vollert's claims, HPD's decision to reprimand Vollert for the statements in his invitation did not violate Vollert's First Amendment rights.

V. Conclusion

This court GRANTS the City's motion for summary judgment.

SIGNED on _____, 1996, at Houston, Texas.

_____
Lee H. Rosenthal

United States District Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-20341

JOHNIE VOLLERT,

Plaintiff-Appellant,

versus

CITY OF HOUSTON, ET AL.,

Defendants,

CITY OF HOUSTON,

Defendant-Apppelle

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-95-674)

Before HIGGINBOTHAM, EMILIO M. GARZA, and DEMOSS, Circuit Judges.
PER CURIAM:*

The district court granted summary judgment in favor of Defendant/Appellee the City of Houston because Plaintiff/Appellant Johnie Vollert failed to raise a genuine fact issue concerning his claim that the Houston Police Department violated his First

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Amendment rights when it issued a written reprimand in response to racially-oriented speech which Vollert published to other officers. We affirm.

BACKGROUND

In December 1992, the City of Houston (the "City") entered into a consent decree that settled **Edwards** ***v. City of Houston.***[1] In ***Edwards-ds,*** the plaintiffs alleged that the

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1. For a discussion of the consent decree in this unpublished case, see the decision of the United States Court of Appeals

Houston Police Department (HPD) discriminated against minorities in hiring and promotions. The consent decree required the City to promote certain minority officers and to determine whether questions on promotion tests were racially biased. Questions determined by the City to be racially biased were to be eliminated from the test results and the applicants' scores were to be adjusted accordingly.

On March 5, 1993, Vollert took the promotion examination for the rank of sergeant. In May 1993, Vollert was elected as a board member of the Houston Police Officers Association (HPOA) At board meetings, Vollert was a vocal opponent of the **Edwards'** consent decree.

In May 1993, the HPD promoted Vollert to sergeant. On May 17, 1993, Vollert placed the following invitation (written on HPOA stationary) in the HPOA mailboxes of his 14 co-

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for the Fifth Circuit in **Edwards v. City of Houston,** 78 F.3d 983 (5th Cir. 1996).

HPOA board members:

> I will be getting promoted (despite my race) on May 24, 1993 at 1:30 pm at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast corner of Memorial and S. Shepherd. You are cordially invited to attend and give proper and justice [sic] respects to those who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

One of the recipients of this letter was Ignacio Aranda, President of the Houston Police Organization of Spanish Speaking Officers (OSSA) Aranda was upset with the racial content of the letter and wrote a letter of protest to both the President of the HPOA, Doug Elder, and the Chief of Police, Sam Nuchia. The contents of the letter became widely known and elicited a strong and well publicized response from the minority officers.

On October 8, 1993, the HPD issued Vollert a written reprimand for distributing the invitation. The reprimand stated, in relevant part:

Investigation revealed that on the above date, while off duty, you prepared a letter to announce your upcoming promotion to sergeant on May 24, *Al* 1993. Although the correspondence was distributed to a limited number of co-workers, you used poor judgment by including remarks and/or terms in the letter which were demeaning to fellow officers, embarrassing to the Department, and of a nature that could be considered a racial slur or to be racially motivated.

It has been determined that, by your actions, you have violated the following:

HOUSTON POLICE DEPARTMENT RULES MANUAL

Section(s) 2.3 - Conduct and Behavior
3.1 - Respect for Fellow officers
4.21 - Use of Racial Jokes and Slurs

Vollert appealed the reprimand to a third party hearing examiner pursuant to Tex. Loc. Gov't Code Ann. § 143.1016 (Vernon Supp. 1996) . On September 29, 1994, the examiner upheld the reprimand but ordered that the reprimand be removed from Vollert's file three years after the date of its issuance if Vollert received no additional disciplinary actions during that time.

Vollert filed this lawsuit on March 6, 1995, alleging that the City violated 42 U.S.C. § 1983 by infringing upon Vollert's First Amendment rights. The district court granted summary judgment in favor of the City holding that, while Vollert's speech was a matter of public concern, it was not entitled to First Amendment protection because, as a matter of law, under the facts of this case, the HPD's interest in the efficient management of its operations outweighs Vollert's interest in the speech Vollert now appeals.

DISCUSSION

As always, we review the district court's order granting summary judgment de *novo*. **Lee *v.* *Wal-Mart Stores Inc.*,** 34 285, 288 (5th Cir. 1994). Summary judgment is appropriate where the record, taken as whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56 (c)

The test used for determining whether a government employer may place limits upon its employee's speech is set forth in ***Vojvodich v.*** Lopez, 48 F.3d 879, 884-885 (5th Cir.), cert. denied, 116 S. Ct. 169 (1995) "To assert the protections of the First Amendment, the employee must establish, as a threshold matter, that his speech or activity related to a matter of public concern." **Id.** at 884. If the employee meets this burden, the employer then must establish that its interest in promoting the efficient services provided by its employees outweighs the employee's interest in engaging in the protected activity. **Id.** at 885 (citing **United *States Dept. of Justice*** v. Federal ***Labor Relations*** Authority, 955 F.2d 998, 1005-1006 (5th Cir. 1992)). "This analysis in reality is a sliding scale or spectrum upon which 'public concern' is weighed against disruption." **Id.** at 884. "We have repeatedly recognized that a stronger showing of disruption may be necessary if the employee's speech more

substantially involves matters of public concern." **Id.** at 885 (internal citations omitted) . Because of the wide variety of situations in which this issue might arise, each case should be considered on its particular facts. **Vojvodich,** 48 F.3d at 885.

To aid our evaluation of a given case, we look to the factors discussed by the Supreme Court in ***Connick v. Myers,*** 103 S. Ct. 1684 (1983).

> Although not intended to be the exclusive considerations, these factors include (1) the degree to which the employee's protected activity involved a matter of public concern, and the gravity of that concern, (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships, (3) the time, place, and manner of the employee's activities, and (4) the context in which the employee's activities were carried out.

Vojvodich, 48 F.3d at 885 (citing **Connick,** 103 S. Ct. at 1694). "A proper consideration of these factors allows a court to balance the plaintiff's interest in the claimed protected activity against the alleged disruption caused by

that activity to the effective and efficient fulfillment of the government's public responsibilities." **Id.**

The district court first determined that Vollert's speech was a matter of public concern. In so finding, the district court stated:

> Police officers had widely discussed the Edwards consent decree, and Vollert had previously discussed the decree with the HPOA board members. Given this context, Vollert's invitation was, in part, a comment on the Edwards consent decree. Police Chief Nuchia appears to agree that through the invitation, Vollert intended to comment upon the Edwards consent decree. The Edwards consent decree was a matter of public concern; Vollert's invitation commented on a matter of public concern.

Having so found, the district court next engaged in a balancing of the HPD' s interests versus Vollert' s interests. Applying the **Connick** factors,[2] the district court held:

2.The district court enumerated the **Connick** factors as follows: (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close relationship between the employees which might be deteriorated by the speech; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the

> The contents of the invitation elicited a strong and well-publicized response from minority officers. HPD found that Vollert's invitation was demeaning to fellow officers, embarrassing to the department, and of a nature that could be considered a racial slur or to be racially motivated. HPD concluded that Vollert's invitation violated department regulations governing the conduct and behavior of an officer, respect for fellow officers, and the use of racial jokes and slurs. HPD and the hearing examiner agreed that Vollert's invitation had the potential to disrupt the efficiency of HPD. As a sergeant in HPD, Vollert works closely with minority officers. Chief Nuchia issued the reprimand to Vollert to prevent further disruption in the department.
>
> The undisputed facts show that HPD's concern that Vollert's invitation would disrupt the efficient operation of the police department had a reasonable basis.

The district court concluded that "HPD's interest in promoting the efficiency of its services outweighs Vollert's interest in disseminating the contents of the invitation." In reaching this conclusion, the district court considered an

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degree of public interest in the speech, and; (6) whether the speech impeded the employee's ability to perform his or her duties. *See* **Connick,** *103* S. Ct. at 1694.7

affidavit submitted by Chief Nuchia.[3]

On appeal, Vollert argues that the district court misapplied the ***Connick/Vojvodich*** factors. Specifically, Vollert argues that there is no evidence of any "actual or

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3. Chief Nuchia affidavit states, in relevant part:

> My intent in issuing the written reprimand to Sergeant Vollert was to prevent any further disruption in the efficiency of the Houston Police Department. As a supervisor in the Houston Police Department, Sergeant Vollert will work closely with minority officers and supervisors. It is essential to the operation of the Police Department that all employees maintain the utmost respect for their fellow officers and supervisors and in my opinion and experience racial jokes and slurs detract from that respect. Such behavior is demeaning and embarrassing to fellow officers and is likely to result in a deterioration in the efficiency of the department. The written reprimand issued to Sergeant Vollert was issued to prevent any further such occurrence and to quell the growing resentment within the Police Department created by the publication of the invitation. The basis of the action was not because of the [sic] Sergeant Vollert's criticism of the consent decree but because of the manner in which it was presented.

threatened[4]" disruption of the HPD's daily commitment to protecting Houston's citizens," or to the "working relationships between Appellant and other officers." Vollert contends that Chief Nuchia "extended his authority outside the parameters of his jurisdiction when he reached into a private union hall to punish Appellant's speech...."

In support of its position, the City offered, *inter alia*, the affidavit of Chief Nuchia which specifically states that Vollert's speech was so offensive, in the context of his work environment, that it caused, and would continue to cause, a disruption to the work environment. Vollert offered no summary judgment evidence showing that his letter did not, or would not, create a disruption. After carefully reviewing the briefs, the record excerpts, and relevant portions of the record itself, for the reasons stated by the district court, we

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4. Vollert agrees that a showing of actual disruption is not required.

are satisfied that the decision of the district court is not in error. The judgment of the district court is, in all things,

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-20341

JOHNIE VOLLERT

Plaintiff-Appellant

v.

CITY OF HOUSTON ET AL

Defendants

CITY OF HOUSTON

Defendant-Appellee

Filed Feb 13 1997
Charles R. Fulbruge III
Clerk

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, EMILIO M. GARZA, AND DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge